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Due Process and
Social Security: One Thread to Ponder Before Oral Argument in *Biestek v. Berryhill*

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The United States Supreme Court is set to hear argument in *Biestek v. Berryhill*[2] on December 4, 2018.[3] Although it may seem like an innocuous Social Security case at first glance, the due process implications for those seeking Social Security benefits could be astounding.

An application for Social Security benefits is subject to a five-step review process by an Administrative Law Judge (ALJ).[4] The claimant bears the burden of proof to establish satisfaction with the first four steps in the process.[5] In the fifth and final step, the burden of proof shifts to the government.[6] Essentially, the first four steps establish that the applicant has a qualifying disability,[7] whereas the final step asks the Commissioner of Social Security to prove whether significant numbers of other jobs exist that the claimant can perform given the disabilities alleged in the first four steps.[8] If the claimant can participate in such other work, the application for benefits is denied.[9]

Biestek is concerned with that final step and the testimony of a "vocational expert." [10] A vocational expert is an individual who can be used to give opinion to meet the Commissioner's burdens on step five of the analysis.[11] During the hearing process, counsel for Michael Biestek, the petitioner in the case, asked the vocational expert to "produce underlying data or analyses" that would support the vocational expert's opinion.[12] The vocational expert "refused to provide [documents] in any form out of concern for the confidentiality of her files".[13] The ALJ declined to provide redacted versions of the documents with the requested information.[14] The Sixth Circuit Court of Appeals upheld this decision[15], rejecting the Seventh Circuit's decision to make said documents available[16] and joining the Second, Third, and Ninth Circuits.[17]

The petitioner relies on *Richardson v. Perales* as the key to their argument.[18] There is one fascinating ripple that is posited in *Perales* that one *amicus* brief from the National Organization of Social Security Claimants' Representatives, AARP, & AARP Foundation believes creates a due process incentive to hold in favor of the petitioner.[19] If the key holding in *Perales* is that due process is afforded to medical opinions used against claimants, then such due process is not afforded when a vocational expert testifies to an ALJ.[20] The effect of that disparity in power is clear: review of the ALJ's decision gives complete deference to the ALJ's treatment of the vocational expert because it places credibility on the vocational expert and not the vocational expert's opinion.[21]

The *amici* points to one case in particular in its analysis: a Seventh Circuit Court of Appeals case applying the side of the split the Sixth Circuit declined to follow.[22] In *Britton v. Astrue*,[23] the Seventh Circuit upheld the ALJ's decision to reject counsel's continued requests for more data from a vocational expert.[24] Instead, the Seventh Circuit suggested a balancing approach that would "encourage ALJs and the Social Security bar to cooperate" to allow the entrance of the vocational expert's data.[25] The Seventh Circuit also suggested that the ALJ play a role in sustaining the confidentiality of the vocational expert.[26]



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This thread of argument in *Biestek* could become an interesting exchange in oral argument. If the Court were to latch onto the *amici curiae* brief's argument of due process, then they may find a solution to the circuit split that properly balances the due process interests of both the Social Security Commission and the numerous claimants filing applications for benefits.

[1]

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[2] *Biestek v. Comm'r of Soc. Sec.*, 880 F.3d 778 (6th Cir. 2017) *cert granted sub nom.* *Biestek v. Berryhill*, 138 S. Ct. 2677 (June 25, 2018).

[3]

Biestek v. Berryhill, SCOTUSBlog, <http://www.scotusblog.com/case-files/cases/biestek-v-berryhill/>
(last visited Oct. 20, 2018).

[4]

20 C.F.R. § 404.1520(a)(4) (2018); 20 C.F.R. § 416.920(a)(4) (2018).

[5]

Brief for Petitioner at 3, *Biestek v. Berryhill*, 138 S. Ct. 2677, No. 17-1184 (Aug. 27, 2018).

[6]

See Preslar v. Sec'y of Health & Human Servs., 14 F.3d 1107, 1110 (6th Cir. 1994).

[7]

Id.

[8]

Id.

[9]

Id.

[10]

See Brief for Petitioner, *supra* note 5 at i.

[11]

20 C.F.R. § 404.1566(3) (2018); 20 C.F.R. § 416.966(e) (2018).

[12]

Biestek v. Comm'r of Soc. Sec., 880 F.3d 778, 790 (6th Cir. 2017).

[13]

Brief for Petitioner, *supra* note 5,
at 13 (internal quotation marks omitted).

[14]

Biestek, 880 F.3d at 790.

[15]

Id.

[16]

See generally, *Donahue v. Barnhart*,
279 F.3d 441 (7th Cir. 2002); *McKinnie v. Barnhart*, 368 F.3d 907 (7th Cir.
2004).

[17]

See generally *Brault v. SSA*, 683 F.3d
443 (2d Cir. 2012); *Welsh v. Comm'r Soc. Sec.*, 662 Fed. Appx. 105 (3d Cir.
2016); *Bayliss v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005).

[18]

See Brief for Petitioner, *supra* note 5, at 18; *Richardson v.*
Perales, 402 U.S. 389, 402–08
(1971).

[19]

See Brief of Nat'l Org. of Soc. Sec.
Claimants' Representatives, et. al. as Amici Curiae Supporting Petitioner at
15, *Biestek v. Berryhill*, 138 S. Ct. 2677, No. 17-1184 (Sept. 4, 2018).

[20]

Id. at 16.

[21]

Biestek v. Comm'r of Soc. Sec., 880 F.3d 778, 791 (6th Cir. 2017). (Stating
that there is "no reason to suppose that the ALJ did not carefully weigh the
credibility of witnesses who testified, and the ALJ's acceptance of [the
vocational expert's] testimony cannot be said to have been improper.") (quoting
Sias v. Sec'y of Health & Human Servs., 861 F.2d 475, 481 (6th Cir. 1988)).
Thus, the Court states that ALJ is responsible for weighing the credibility of
witnesses, who in this case acceptably fulfilled that obligation, *id.*

[22]

Id.

[23]

Britton v. Astrue, 521 F.3d 799 (7th Cir. 2008).

[24]

Id. at 804.

[25]

Id.

[26]

Id. (stating that the ALJ's offer to counsel to review "copies" of material relied on was rejected although it was a perfectly acceptable option to review the vocational expert's opinion).

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